IN THE

Supreme Court of the United States

OCTOBER TERM 1955

No. 342

BLAZEY CZAPLICKI,

Petitioner,

v.

The vessel "SS HOEGH SILVERCLOUD" her boilers, engines, tackle, apparel and furniture, OLVIND LORENTZEN, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of THE NORWEGIAN SHIPPING AND TRADE MISSION, KERR STEAMSHIP COMPANY, INC., and HAMILTON MARINE CONTRACTING COMPANY, INC.,

Respondents.

BRIEF OF RESPONDENT, HAMILTON MARINE CONTRACTING COMPANY, INC., ON THE MERITS

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The Questions Presented

1. Whether a valid award of compensation pursuant to the provisions of 33 U. S. C. § 933 was made to the petitioner?

2. Whether, after a statutory assignment of the injured employee's cause of action to his employer has been effected pursuant to the provisions of that statute, any right to control or direct prosecution of the assigned cause of action remains vested in the injured employee?

3. Was the Court of Appeals in error in deciding the case on the issue of laches?

Statutes Involved

The provisions of Title 33 U. S. C. § 933 are set forth in petitioner's brief, with the exception of subdivision (d) which reads as follows:

> "Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceedings."

Title 33 U. S. C. § 921 provides in part:

> "(a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.
>
> (b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). • • •
>
> (d) Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 18."

Statement

The relevant facts have been set forth with substantial accuracy in the petitioner's brief. After the notice of controversy had been filed by the insurance carrier with the compensation commission, Mr. D. B. O'Keeffe, Claims' Examiner, called the petitioner in and explained to him the provisions of the Longshoremen's Act. The memorandum of this interview made by Mr. O'Keeffe is contained in Respondent Hamilton's Exhibit A, received in evidence at page 3 of the record and printed at page 74. The memorandum states:

> "The claimant called on September 27, 1945, and the provisions of section 33 (b) of the Act were explained to him. He stated very definitely that he desired to receive his compensation and to waive any rights to the third party action, and that he did not desire to consult an attorney in the matter.
> He filed a claim for compensation and a formal order will be issued accordingly."

At the hearing before Judge Ryan, counsel for the petitioner admitted that an award had been duly made. The following took place at that hearing:

> "The Court: Do you admit that thereafter and on September 28, 1945, the deputy commissioner of the Second Compensation District duly made an award and entered an order directing payment of compensation to the libelant in accordance with the terms of the Compensation Act?
>
> Mr. Baker: We admit that, but we would like counsel to also admit that that award was made without a hearing, without any trial or without any notice to any of the parties, and without the libelant, Mr. Czaplicki, the claimant in the compensation case, being represented by counsel." (R. p. 3)

In the compensation award the deputy commissioner found as a fact that the claimant had "sustained a contusion and abrasion of the right leg, contusion and abrasion of the left elbow, contusion of the left side of the chest, and contusion and hematoma of the left hip". (Libelant's Exhibit 2, admitted at page 5 of the record, printed at pages 67 and 68.) The compensation awarded was at the rate of $22.50 a week for temporary total disability (R. p. 68), and the total amount paid was $160.72 (R. p. 6).

Summary of Argument

1. The award of compensation to the petitioner made by the deputy commissioner was made in substantial compliance with the provisions of the statute with reference to the making of awards, and was, therefore, valid.

2. The statutory assignment of petitioner's cause of action to his employer, effected by the acceptance of compensation payments pursuant to the award, was, in the absence of fraud, absolute. There is neither proof nor claim of fraud in this case. The assignment vested complete control over that cause of action in the employer and no trustee relationship could arise until a recovery was had in excess of the amount necessary to recoup payments made pursuant to the award. Even if it be held that the assignee is a constructive trustee of the cause of action, the assignee must still be accorded a reasonable discretion in determining whether to institute proceedings or not, apart entirely from the fact that it is given that discretion specifically by the terms of the statute. The fact that the same insurance carrier insures the employer for compensation and the third-party tortfeasor for liability does not materially affect the principle. In the absence of proof of fraud or bad faith, the injured employee would have no right to interfere with, or compel the prosecution of, the cause of action.

3. In the absence of any explanation by the petitioner for the delay in commencing the action, the Court of Appeals properly held that the defense of laches was a bar to any action by him.

POINT I

The award was properly made.

When the petitioner here was unable to make up his mind whether to take compensation or to prosecute an action against the third-party, the insurance carrier filed a notice that it was controverting the claim. In this it followed a procedure outlined in the opinion in *American Stevedores* v. *Porello*, 330 U. S. 446, where it was said:

> "American, in the unusual circumstances of this case, could have protected itself by controverting the employee's right to receive compensation. In this way, it could probably have forced an award and the consequent assignment of the right of action to itself."

On receipt of the notice of controversy, the claims examiner wrote to the petitioner informing him that payments of compensation were being withheld pending his election to take compensation or to sue the third-party, and outlining his rights to him. Some days later the claims' examiner interviewed the petitioner at the Commission office and again explained his rights to him. The petitioner then elected to take compensation and filed a notice of claim. Under the circumstances no hearing was necessary and no hearing was held. The deputy commissioner entered an order awarding compensation to the petitioner. This order was filed in the Office of the Deputy Commissioner and became final after thirty days.

The petitioner objects to the procedure adopted by the deputy commissioner, apparently on the ground that the

notice to the employer that the claimant had filed a claim for compensation and the order of the deputy commissioner are both dated September 28, 1945. The basis for that contention is the wording of subdivision (c) of section 919 of the Act, which provides:

> "If no hearing is ordered within twenty days after notice is given as provided in subdivision (b), the deputy commissioner shall, by order, reject the claim or make an award in respect to the claim."

The petitioner contends that, in a case where no hearing is ordered, the deputy commissioner must allow twenty days to elapse from the time he serves on the employer notice that a claim for compensation has been filed by the employee before making an award. It is respectfully submitted that the meaning of that provision is that the commissioner must make an award within the twenty days, not that he must wait twenty days before making his award. However, even if the interpretation sought to be put upon the provision by the petitioner is valid, the employer, by not objecting on the ground of insufficient notice, waived that objection (*Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244; *Harris* v. *Hoage*, 66 F 2d 801, 804; *Globe Stevedoring Co., Inc.*, v. *Peters*, 57 F 2d 256).

The petitioner further objects that the order was not final. There is no requirement in the statute that an award be final. Of necessity awards in compensation matters are provisional, subject to change or modification with the change in physical condition of the injured workman. The provision of § 933 (b) of the statute is that "acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment"; there is no requirement that it be acceptance of compensation under a final award. The authority cited by petitioner in his brief, *American Mutual Liability Insurance Co.* v. *Lowe*, 13 F Supp. 906, affirmed 85 F 2d 625, holds nothing to the contrary. In

that case the award was not filed as required by the statute, nor was it served; obviously it was not a binding award. There were no such defects in the award made here.

It has already been pointed out that counsel for the petitioner, in the hearing before Judge Ryan, admitted that the award had been duly made and entered on an order directing payment of compensation to the petitioner. The Compensation Commission had jurisdiction of the parties and of the subject matter. The award was made and filed by the commissioner in substantial compliance with the requirements of the statute. No question was raised either by the employer or by the insurance carrier that the required notice had not been given. Even less formal procedures in the making of awards have had the sanction of the courts (*Grass* v. *Lorentzen*, 149 F 2d 127, 218). In the *Grass* case, *supra*, the court said:

> "As a result of the amendment there must now be official action by the deputy commissioner establishing an award of compensation in order to make such acceptance an assignment of the employee's cause of action against the third party. Although the award may be informal, see *Toomey* v. *Waterman Steamship Corp.*, 2 Cir., 123 F 2d 718, it must amount to an award by the deputy commissioner."

What the petitioner is doing here is in effect making a collateral attack on the award. His time to attack the award has long since elapsed. He cannot now redeem his failure to move in time with respect to the award by claiming that it was not an award.

POINT II

The assignment resulting by operation of Title 33 U. S. C. A. section 933 (b) is, in the absence of fraud, absolute, vesting in the employer or the insurance carrier complete control of the cause of action against the negligent third-party until a recovery is had either by settlement or after a trial.

The design and the purpose of the Longshoremen's Act was to provide injured workmen with assured compensation for injuries received in the course of their employment. The provisions of the act with reference to actions against negligent third-parties responsible for the workman's injuries are incidental to the main scheme of the act. The injured workman's right to sue a negligent third-party was preserved, but not as an absolute right. He was given a choice. He could elect to sue the negligent third-party or to take compensation; he was not permitted to do both.

As the act was originally written, the workman's binding election was evidenced by the mere acceptance of compensation. Problems arising in the courts as to the justice of binding the injured workman to an election which he might have made in ignorance of his rights (Cf. *Johnsen v. American Hawaiian S.S. Co.*, 98 F 2d 847, 850) prompted the Congress to amend the act in 1938 to its present form in which acceptance of compensation under an award constitutes a binding election. This eliminated the possibility of the injured workman claiming that he had accepted compensation in ignorance of his rights. In the proceedings leading to the award the workman is apprised of his rights, and he is then free to choose whether to sue or to accept compensation. The procedure is illustrated in this case. The petitioner, first in a letter from the claims' examiner, and later in a personal interview at the Commission Office, was fully apprised of his rights and of the choice which he was entitled to make.

Once the injured employee makes a binding election to take compensation, whether by acceptance of compensation under the original provisions or by acceptance of compensation under an award pursuant to the amendment, his election operates as an assignment of his cause of action to his employer, and it has been uniformly held that the assignment is absolute. (*Doleman* v. *Levine*, 295 U. S. 221; *Aetna L. Ins. Co.* v. *Moses*, 287 U. S. 530; *Christiansen* v. *United States*, 194 F 2d 978; *Moore* v. *Hechinger*, 127 F 2d 746; *Johnsen* v. *American Hawaiian S.S. Co.*, 98 F 2d 847; *Hunt* v. *Bank Line*, 35 F 2d 136.) By the specific provisions of the statute the assignment gives to the employer the right to institute proceedings or to compromise without proceedings. Discussing all the provisions with reference to the assignment, the opinion in *Hunt* v. *Bank Lines, supra*, stated:

> "When all of these sections are considered together, it is clear that the intention of the act is to require the employee who claims to have been injured by the negligence of a third person to elect whether he will accept compensation under the act or proceed against such third person. If he elects to receive compensation his cause of action is transferred to his employer and he has no other or further interest therein, unless the employer recovers more than enough to reimburse him for the compensation paid, with costs and expenses in which event the excess belongs to the employee. * * * He can elect which course he will follow, but he cannot follow both. * * * It is the employer, to whom the cause of action is assigned upon payment of compensation, who is given the right of deciding whether he will hazard the costs and expenses of suit. It is the employer who is given the power to determine whether a compromise shall be accepted or not. And the employee, having accepted the compensation which the law has fixed, has no further interest in the matter, unless the employer decides to sue and succeeds in recovering

more than is necessary for his reimbursement. Then, and not until then, the interest of such employee arises, and this is given by the statute to the employee, not, we think, because he is deemed to have any interest in the cause of action, but to avoid the unseemly spectacle of the employer realizing a profit from his injury."

In the States whose compensation acts most closely resemble the Federal Act, the same interpretation has been given to the assignment provisions. (*Whalen* v. *Athod Mfg. Co.*, 242 Mass. 547; *Skakandy* v. *State of New York*, 274 App. Div. 153.) In *Skakandy* v. *State of New York*, *supra*, the opinion expresses the same view of the assignment as did the opinion in *Hunt* v. *Bank Line*:

"The assignment resulting by operation of Section 29 aforesaid, is an absolute one. (*Travelers Ins. Co.* v. *Brass Goods Mfg. Co.*, 239 N. Y. 273; *Travelers Ins. Co.* v. *Padula Co., Inc.*, 224 N. Y. 397). Such assignment divests the next of kin, who are also dependents and who accept compensation, of their rights and privileges under the Decedent's Estate Law and vests in the carrier assignee the ownership of the claim. (*Carter* v. *Brooklyn Ladder Co., Inc.* 265 App. Div. 39; *Calagna* v. *Sheppard Pollak, Inc.*, 264 App. Div. 589, 593.) It carries with it the right to conduct litigation (*Grossman* v. *Consolidated Edison Co.*, 294 N. Y. 39, 44) and to "sue or compromise at will." (*Matter of Zirpola* v. *T. & E. Casselman, Inc.*, 237 N. Y. 367, 375.) The language of the statute is plain, contains no exceptions or limitations and is fully operative and binding even when the assignee has by previous agreement disabled itself from taking advantage of the cause of action. (*Taylor* v. *New York Central RR. Co.* 294, N. Y., 397.) The statutory assignment having become operative, the carrier was under no duty to prosecute against the third party,

> and had full authority to compromise and settle, even for a lesser amount than it had paid by way of compensation. (*Corsi* v. *Jenkins*, 66 N. Y. S. 2d 98.) The conclusion therefore seems inescapable that the statutory assignment carries with it, in the absence of fraud, the right to compromise or otherwise dispose of the claim at any stage of the proceedings, for such sum as the assignee may deem proper and sufficient."

This interpretation of the nature of the statutory assignment by the courts must certainly have been known to the Congress when it had before it consideration of the amendments to Section 933 in 1938. The fact that no change was made with respect to the effect of the assignment at that time would seem to indicate that Congress was satisfied that the interpretation given by the courts expressed the legislative intent. Under similar circumstances the New York Legislature did amend the provisions of its Compensation Act to provide that the injured workman could take compensation and prosecute his action at the same time.

A statement made by Judge Learned Hand in his opinion in *United States Fidelity & Guaranty Co.* v. *United States*, 152 F 2d 46, has again agitated the question and prompted the contention that the injured employee does retain some control over the cause of action even before a recovery is had. Judge Hand said:

> "The assignee is in effect a trustee, and, although it is true that the statute gives him power to compromise the whole claim, he must not in doing so, entirely disregard the employee's interest. Certainly, he may not in advance release the whole claim upon consideration that he shall be personally released from his liability for workmen's compensation."

Taken out of context the dictum that the assignee is a trustee of the cause of action for the benefit of the injured

workmen is contrary to the express provisions of the statute and contrary to the established interpretation of the courts. In its context, however, it was a perfectly valid statement since it is quite obvious that the assignee is a trustee to the extent that he cannot seek to avoid his responsibility for compensation payments through the medium of the assignment. And it is clear from the context of the whole opinion that that is as far as Judge Hand intended it to go. The interest of the injured workmen does not arise, and the trustee relationship is not established, until a recovery is had in excess of the amount necessary to reimburse the assignee. The excess is held by the assignee for the benefit of the injured workmen and the apparent reason for that, as pointed out in *Hunt* v. *Bank Line, supra,* is not that the employee "is deemed to have any interest in the cause of action, but to avoid the unseemly spectacle of the employer realizing a profit from his injury."

That is not to say that if the injured employee could show fraud or bad faith on the part of the assignee to his damage he would have no right to redress. But that would be in an action against the assignee, not in an action against the negligent third-party.

The contention made by the petitioner here seems to be based on the assumption that the mere fact that the same insurance company insures the employer for compensation and the negligent third-party for liability compels an inference of fraud or bad faith. There is no warranty for any such assumption. The very facts of the case negative any inference of fraud or bad faith. The injuries received by this petitioner, which are set forth in the compensation award, and which were known to the insurance carrier, were negligible. The total compensation paid amounted to $160.72. There is nothing in the record to indicate, and there is no proof, that the injured employee at any time notified his employer that he had suffered

other or more serious injuries. Under those circumstances, and even if it were conceded that the employer was a trustee of the cause of action, there could be no presumption of bad faith on the part of the employer in not prosecuting an action to recover for such insignificant injuries. The powers given by the statute to the assignee include the power to institute proceedings or not as it sees fit. If the petitioner claims that a fraud was perpetrated on him he has his remedy, but that remedy does not include a direct action by him against a negligent third-party in entire disregard of the statutory assignment.

The petitioner here seeks to create the impression that the compensation award was inadequate. He does not explain why the injuries which he now claims to have resulted from his accident were not established before the Compensation Commission where they could have been adequately compensated. If they arose out of his accident, he had full opportunity of establishing that fact before the Compensation Commission; if they did not, then they could not be established in a common law action for negligence. In any event he can scarcely complain that the assignee of his cause of action, knowing only of the insignificant injuries which were established before the Compensation Commission, chose not to incur the expense of litigation.

It is difficult to understand just what right the petitioner seeks to establish here with respect to the assigned cause of action. He cannot establish that he has a right to compel the assignee to institute proceedings since the statute permits the assignee to compromise without the institution of proceedings; he cannot interfere in the settlement of the action since the statute gives the right to the assignee to settle if it sees fit. His remedy would seem to be confined to that allowed him by law in the event that he can prove fraud, and that has been the uniform interpretation of the Act by the Courts.